IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al.,	)	
Plaintiffs	)	**05-CV-00329-TCK-SAJ**
v.	)	
TYSON FOODS, INC., et al.,	)	
Defendants.	)	

ATKINSON, HASKINS, NELLIS, BRITTINGHAM, GLADD & CARWILE
A PROFESSIONAL CORPORATION

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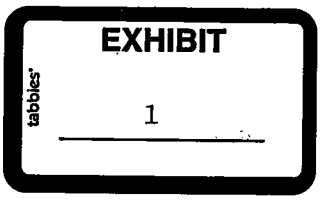

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THIRD-PARTY DEFENDANT WANDA L. DOTSON'S CORRECTED MOTION TO DISMISS THIRD-PARTY PLAINTIFFS' COMPLAINT AND BRIEF IN SUPPORT

COMES NOW Third-Party Defendant Wanda L. Dotson, by and through her attorney of record, K. Clark Phipps of Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, and hereby moves to dismiss Third-Party Plaintiffs' Complaint for contribution and indemnity. This motion is made on the grounds that when the Third-Party Complaint is construed in the light most favorable to Third-Party Plaintiffs, they have failed to state a claim for indemnity and contribution upon which relief can be granted. This Motion is made pursuant to Fed. R. Civ. Pro. 12(b)(6).

I. BRIEF STATEMENT OF THE CASE

On August 19,2005, the State filed its First Amended Complaint ("FAC') in order to hold various Poultry Integrator Defendants accountable for their past and continuing improper management and disposal of poultry waste within Arkansas and Oklahoma which have caused pollution of the Oklahoma portion of the Illinois River Watershed ("IRW"). These Poultry Integrator Defendants' improper conduct with respect to their management and disposal of poultry waste is alleged to be knowing and intentional. *See, e.g., FAC, Docket No. 18.*

The F AC asserts claims against the Poultry Integrator Defendants under ten distinct common law and statutory causes of action. Certain Poultry Integrator Defendants responded by filing third-party complaints against more than one hundred entities that live, own land or conduct business in the Oklahoma portion of the IRW. Specifically, on October 4, 2005, Poultry Integrator Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George's, Inc., George's Farms, Inc., and Willow Brook Foods, Inc. (collectively referred to, for purposes of this brief, as "Third Party Plaintiffs") filed a

Third-Party Complaint ("Third-Party Complaint") naming 160 Third-Party Defendants and 150 "Doe" Defendants. *See Third-Party Complaint, Docket No. 80.*

As to the named Third-Party Defendant, Wanda L. Dotson ("Dotson"), the Third-Party Complaint alleges that she "permits cattle to graze and deposit manure on ... (her) property. Additionally ... (she) systematically applies fertilizers and other chemicals to the property for hay production within the IRW. The operations and activities described above have and continue to result in the release of phosphorous and other constituents into the IRW." *See* Third-Party Complaint, p. 168 . This alleged activity by Dotson, which she neither admits or denies at this time, is wholly unrelated to the improper actions of the Third-Party Defendants that are at issue in this case. As such, the Third-Party Complaint against Dotson should be dismissed without further consideration. In the alternative, these claims should severed from the main case and stayed.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 14(a) provides that "[a]t any time after commencement of the action a defending party, as a Third-Party Plaintiff, may cause a Summons and Complaint to be served upon a person not party to the action who is or may be liable to Third-Party Plaintiff for all or part of the Plaintiff's claims against the Third-Party Plaintiff . . . ." Equally importantly, the rule further provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial." Fed. R. Civ. Proc. 14(a).

For a Third-Party Complaint to be proper under Rule 14(a), however, the Third-Party Defendant must be one who is or may be liable to the Third-Party Plaintiff for all or part of the Plaintiff's claim against the Third-Party Plaintiff. "Third-party practice under Rule 14(a) neither creates nor enlarges upon the substantive rights of the parties, but merely provides the procedure for

the assertion of those rights." *Weil v. Dreher Pickle Company*, 76 F.R.D. 63, 66 (W.D. Okla. 1977). In other words, "[a] Defendant may bring in a Third-Party Defendant only if the prospective Third-Party Defendant is or may be liable to the Defendant under substantive law." *Weil*, 76 F.R.D. at 65. As explained by the Tenth Circuit, "[i]f there is no right to relief under the substantive law, impleader is improper." *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1498 (10th Cir. 1983) (citation omitted) "If, for example, the governing law does not recognize a right to contribution or indemnity, impleader for these purposes cannot be allowed." Wright & Miller, *6 Fed. Prac. & Proc. Civ. 2d* § 1446.

However, "even when there is a substantive right that creates secondary liability in favor of a Third-Party Plaintiff, it must be remembered that the court may exercise its discretion to dismiss a Third-Party Complaint." *Blais Construction Company, Inc. v. Hanover Square Associates*, 733 F.Supp. 149, 158 (N.D.N.Y. 1990) (quotations and citation omitted). "The decision as to whether or not the claim should remain in the proceeding is left to the sound discretion of the court." *In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. 435,437 (N.D. Okla. 2003). "Courts, in exercising their discretion whether third-party claims should be allowed or stricken, generally balance the benefits of allowing the claim to proceed against the potential prejudice to the Plaintiff and the Defendant in the lawsuit and, the Third-Party Defendant." *In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. at 437. "Even if a Court concludes that a third-party action should not be stricken, Fed. R. Civ. Pro. 14(a) expressly recognizes that severance of the third-party claims may nevertheless be warranted. Alternatively, severance may be sought under Fed. R. Civ. Pro. 21, which provides that '[a]ny claim against a party may be severed and proceeded with separately.'" *In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. at 437. For instance, Fed. R. Civ. P. 42(b)

provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . third-party claim." District courts have the inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and litigants." *Landis v. North American Co.*, 299 U.S. 248, 254'(1936).

In this case, for the foregoing reasons, under the federal substantive law of contribution and indemnity, Third-Party Plaintiffs are not entitled to relief from Dotson in this case. This Third-Party Complaint should therefore be dismissed for failure to state a claim per Fed. R. Civ. Proc. 12(b)(6). At the very least, the Third-Party Complaint against Dotson should be severed and stayed in the interest of fairness and judicial economy.

III. ARGUMENT

A. There Is No Right to Contribution or Indemnity in Favor of a Third-Party Plaintiff Found Liable to the State Under its Nuisance or Trespass Claims

1. State Law Nuisance and Trespass

The State has asserted claims the Third-Party Plaintiffs under the Oklahoma state law of nuisance and trespass. *See* FAC, *Docket No. 18*. With respect to its state law nuisance and trespass claims, the State seeks to recover from the Third-Party Plaintiffs, jointly and severally, *inter alia*, monetary damages caused by the nuisance and trespass and equitable relief including an injunction requiring abatement of the conduct, payment of the costs of remediation and costs of assessment. Additionally, under these claims, the State is seeking exemplary and punitive damages. *See* FAC, *Docket No. 18*.The Third-Party Complaint against Dotson, in turn, attempts to assert claims for contribution and indemnity under the State's state law nuisance and trespass claims against the

Third-Party Defendants, including Dotson. *See* Third-Party Complaint, *Docket No. 80.* Inasmuch as the State's state law nuisance and trespass claims sound in intentional tort, however, claims for contribution do not exist against Dotson. See FAC, *Document No. 18*. Specifically, 12 Okla. Stat. § 832(C) provides in unequivocal terms that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." (Emphasis added.)

Likewise, the Third-Party Complaint's claims for indemnity under the State's state law nuisance and trespass claims are unavailing. "The general rule of indemnity is that one without fault, who is forced to pay on behalf of another, is entitled to indemnification." *National Union Fire Insurance Co. v. A.A.R. Western Skyways, Inc.*, 784 P.2d 52, 54 (Okla. 1989) (emphasis added). In the State's lawsuit, the Third-Party Plaintiffs are being sued for their own actions, not for the actions of Dotson. Thus, the Doctrine of Indemnity is plainly not applicable.

Further, as explained by the Oklahoma Supreme Court, "the right of indemnity may arise out of an express. (contractual) or implied (vicarious) liability. However, Oklahoma case law has always premised this right of indemnity on the understanding that a legal relationship exists between the parties . . . . Clearly then, there must exist a legal relationship arising out of either contractual or vicarious liability on which to base the remedy [of indemnity]." *A.A.R. Western Skyways, Inc.*, 784 P.2d at 54-55 (emphasis in original). In their Third-Party Complaints, Third-Party Plaintiffs have not alleged the existence of a contractual relationship between themselves and Dotson. Neither have the Third-Party Plaintiffs alleged the existence of a legal relationship between themselves and the Dotson, such that the Third-Party Plaintiffs' liability to the State is solely a vicarious liability for Dotson's primary alleged wrongful acts. These facts are fatal to the third-party indemnity claims in the Third-Party Complaint against Dotson.

Finally, in any event, it must be noted that "an intentional wrongdoer is not eligible to recover indemnity." *Olson Farms, Inc. v. Safeway Stores, Inc.*, 649 F.2d 1370, 1379 (10th Cir.1979); *Tillman v. Shofner*, 90 P.3d 582, 585 (Okla. Civ. App. 2004). As noted above, the State has alleged the Third-Party Plaintiffs' conduct to be intentional. *See* FAC, *Docket No. 18*. Thus, even assuming *arguendo* the existence of a cognizable relationship between Dotson and the Third-Party Plaintiffs, the indemnity claims of the latter would fail. Simply put, the Third-Party Plaintiffs have "no right to relief under the substantive law" of Oklahoma on nuisance and trespass for contribution or indemnity, and therefore their claims for contribution and indemnity in their Third-Party Complaint are improper. *See Hefley*, 713 F.2d at 1498.

2. Federal Common Law of Nuisance

The State has also asserted a claim against the Third-Party Plaintiffs under the federal common law of nuisance. *See* FAC, *Docket No. 18*. With respect to the federal common law of nuisance claim the State seeks to recover from the Third-Party Plaintiffs, jointly and severally, *inter alia*, monetary damages caused by the nuisance and equitable relief, including an injunction requiring abatement of the conduct, payment of the costs of remediation, and costs of assessment. Additionally, under this claim, the State is seeking exemplary and punitive damages. *See* F AC, *Docket No. 18*. The Third-Party Complaint against Dotson, in turn, attempts to assert claims for contribution and indemnity under the federal common law of nuisance against Dotson. *See* Third-Party Complaint, ¶ 203. In this case, claims for contribution and indemnity under federal common law of nuisance, however, simply do not exist against Dotson.

"Federal common law is generally based on the prevailing view among the states. These prevailing views are in turn distilled primarily from the American Law Institute's Restatements of

the Law and treatises." *La Belle Management, Inc. v. Great-West Life Assurance Co.*, 2001 WL 1924620, * 1 (E.D. Mich. Oct. 24, 2001) (citations omitted); see also *In re Sunrise Securities Litigation*, 793 F.Supp. 1306, 1317 (E.D. Pa. 1992) ("The Restatements of Law, which represent comprehensive statements of general principles adhered to by the various states, can also serve as a source of the federal common law"). It logically follows that the Restatement (Second) of Torts should be looked to in determining whether, under the federal common law of nuisance, the Third-Party Plaintiffs' claims for contribution or indemnity against Dotson are viable. Inasmuch as the State has alleged that the Third-Party Plaintiffs' conduct has been intentional, *see* F AC, ¶¶ 48-57 & 110-13, the claims for contribution against Dotson are plainly not viable. Section 886A(3) of the Restatement of Torts expressly provides that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused the harm." Restatement (Second) of Torts, § 886A(3) (emphasis added).

Similarly, under the federal common law of nuisance, the Third-Party Plaintiffs' claims Dotson for indemnity are not viable either. Given that no contractual basis is alleged for the Third-Party Plaintiffs' indemnification claims against Dotson, it necessarily follows that if they are to be viable the claims must arise out of vicarious liability. *See* Restatement (Second) of Torts, § 886B (listing instances where indemnity is appropriate). However, no legal relationship is alleged to exist between Third-Party Plaintiffs and Dotson, and thus there can be no vicarious liability either. Further, as noted above, even assuming *arguendo* that such a relationship were to exist, given that Third-Party Plaintiffs' conduct has been intentional, the claims would fail as a matter of law. *See Olson Farms*, 649 F.2d at 1379 (stating the rule that an intentional wrongdoer is not eligible to recover indemnity "applies whether recovery is being sought under federal common law. . . or state

law. . . ."). Therefore, the Third-Party Plaintiffs' claims for indemnification against the Dotson under the State's federal common law of nuisance claim must fail. *See Hefley*, 713 F.2d at 1498.

B. There is No Right of Contribution or Indemnity in Favor of a Third-Party Defendant Found Liable to the State Under its Unjust Enrichment Claim

The State has asserted an unjust enrichment claim against the Third-Party Plaintiffs. *See* FAC, *Docket No. 18*. With respect to the unjust enrichment claim, the State seeks restitution and disgorgement of all gains the Third-Party Plaintiffs have realized in consequence of their wrongful conduct. *See* FAC, ¶ 147. Third-Party Plaintiffs, through their Third-Party Complaints, have attempted to assert claims for contribution and indemnity under a theory of unjust enrichment against Dotson. *See* Third-Party Complaint, ¶ 203, & and Third-Party Complaint, ¶ 39, Docket No. 80 B. These claims fail, however, because they fail to appreciate that the focus of the remedies of restitution and disgorgement is on the unjust enrichment (i.e., gain) enjoyed by the violator. *See, e.g., French Energy, Inc. v. Alexander*, 818 P.2d 1234, 1237 (Okla. 1991) ("Recovery, based on unjust enrichment depends upon a showing that [defendants] have money in their hands that, in equity and good conscience, they ought not be allowed to retain"). In the present case, that unjust enrichment is "the costs of properly managing and disposing of their poultry waste." *See* PAC, ¶ 142. As the FAC presently stands, the State *has not* alleged that each of the Third-Party Plaintiffs is jointly and severally liable for the whole of the unjust enrichment, that is to say that both each Poultry Integrator Defendant's individual unjust enrichment, as well as all of the other Poultry Integrator Defendants' respective unjust enrichments. The Oklahoma contribution statute makes clear that a prerequisite to a right of contribution under Oklahoma law is joint or several liability. See 12 Okla. Stat. § 832(A) ("When two or more persons become jointly or severally liable in tort

for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them except as provided in this section") (emphasis added). Accordingly, the Third-Party Plaintiffs' claims for contribution under the State's claim for unjust enrichment against Dotson should be dismissed without further consideration. *See Hefley*, 713 F.2d at 1498.

Additionally, the Third-Party Plaintiffs' claims for indemnity against Dotson should be stricken because, as noted above, Third-Party Plaintiffs have not alleged in their Third-Party Complaint either a contractual relationship or a basis for vicarious liability between themselves and Dotson, thereby dooming these claims as well. *See A.A.R. Western Skyways, Inc.*, 784 P.2d at 54-55. Further, as noted above, the Third-Party Plaintiffs' conduct is alleged by the State to be intentional, thus further underscoring the lack of merit of the indemnity claims. *See Tillman*, 90 P.3d at 585.

C. There is No Right of Contribution or Indemnity in Favor of A Third-Party Plaintiff Found Liable to the State Under its State-Law Statutory Claim

The State has asserted claims against the Third-Party Plaintiffs for violations of the Oklahoma Environmental Quality Code, *see* FAC, ¶¶ 128-32, Docket No. 18, the Oklahoma Agricultural Code, *see* FAC, ¶¶ 128-32, Docket No. 18, the Oklahoma Registered Poultry Feeding Operations Act, *see* FAC, ¶¶, 133-36, and the Oklahoma Concentrated Animal Feeding Operations Act, see FAC, ¶¶ 137-39.[1] With respect to these claims, the State seeks, *inter alia*, an assessment of penalties against the Third-Party Plaintiffs for each violation together with attorney fees and costs, injunctive relief, and all such other relief as may be provided for under the law. *See* F AC, ¶¶ 132,

[1] These claims are distinct from the nuisance per se claims made within Count 4 of the FAC. As explained in *Branch v. Western Petroleum, Inc.*, 657 P.2d 267,276 (Utah 1982), "[w]hen the conditions giving rise to a nuisance are also a violation of a statutory prohibition, those conditions constitute a nuisance per se . . . ."

136 & 139. The Third-Party Complaint against Dotson, in turn, attempts to assert claims for contribution and indemnity under the State's state-law statutory claims against Dotson. *See* Complaint, ¶ 203, & Third-Party Complaint, ¶ 39. Inasmuch as the focus of these state law statutory claims is regulating and deterring conduct rather than compensating for injury, however, claims for contribution do not exist against Dotson.

The language of each of the state-law statutory provisions at issue demonstrates this underlying purpose. First, each provision speaks in terms of prosecuting "violations" by individual actors. *See, e.g.*, 27A Okla. Stat. § 2-3-504(E) ("prosecution of a violation by any person"); 2 Okla. Stat. § 10-9.11 (A)(2) ("prosecution of a violation by any person"); 2 Okla. Stat.§ 20-26(E) ("prosecution of a violation by any person "). Second, each provision speaks in terms of regulating and deterring conduct rather than compensating injury caused by violations. 27A Okla. Stat. § 2-3-504(E) & (F) (providing for recovery of penalties, mandatory or prohibitive injunctive relief, interim equitable relief and punitive damages); 2 Okla. Stat. § 1O-9.11(C) (providing for recovery of penalties, mandatory or prohibitive injunctive relief, interim equitable relief and punitive damages); 2 Okla. Stat. § 20-26(E) & (F) (providing for recovery of penalties, mandatory or prohibitive injunctive relief, interim equitable relief and punitive damages). Since none of the state law statutory schemes at issue expressly provides for compensatory damages, an injury is not being compensated for, and it follows that a right of contribution would be inconsistent with these state law statutory schemes.

Indeed, underscoring that a right of contribution does not exist with respect to violations of these state law statutes, and the remedies provided therein, is the fact that these state law statutes nowhere provide for the imposition of joint or several liability. A prerequisite to a right of

contribution under Oklahoma law is joint or several liability in tort. *See* 12 Okla. Stat. § 832(A). Where a statutory scheme does not provide for a right of contribution, courts should not create one. *See, e.g., Sears v. Atchison, Topeka & Santa Fe Railway Co.*, 749 F.2d 1451, 1454 (10th Cir. 1984) ("The Supreme Court stated that it was unwilling to create a contribution remedy for a statutory violation when Congress had not manifested any intent that a right of contribution should exist"). Simply put, the Third-Party Plaintiffs' claims for contribution against Dotson that arise out of their violations of these state law statutes must fail.

As to the indemnity claims asserted by Third-Party Plaintiffs under the State's state law statutory claims, as noted above, Third-Party Plaintiffs have not alleged in their Third-Party Complaint either a contractual relationship or a basis for vicarious liability between themselves and Dotson. *See A.A.R. Western Skyways/Inc.*, 784 P.2d at 54-55. Therefore, these claims must fail as well.

D. There Is No Right of Contribution or Indemnity in Favor of a Third-Party Plaintiff Found Liable to the State Under Its RCRA Claim

The State has asserted, pursuant to RCRA, a citizen suit claim under 42 D.S.C. §6972(a)(1)(B) against the Third-Party Plaintiffs. FAC, ¶¶ 90-97. With respect to the RCRA claim the State seeks, *inter alia*, an injunction requiring the Third-Party Plaintiffs to abate the endangerment to health or the environment, as well as reasonable attorney and expert witness fees. *See* FAC,¶¶ 96-97. The Third-Party Complaint against Dotson, in turn, has attempted to assert claims for contribution and indemnity under RCRA against Dotson. *See* Third-Party Complaint, ¶ 221, &¶ 56.

Claims for contribution and indemnity under RCRA, however, do not exist against Dotson. FCA. *Associates v. Texaco, Inc.*, 2005 WL 735959, *3 (W.D.N.Y. Mar. 31, 2005) ("There is no remedy of contribution under RCRA . . . If); *Aero-Motive Company v. Becker*, 2001 WL 1699194, *6 (W.D. Mich. Dec. 6, 2001) ("Under § 6972(a)(I)(B) of RCRA, contribution claims are not available. . ."); *Davenport v. Neely*, 7 F.Supp. 2d 1219, 1226-31 (M.D. Ala. 1998) (holding that defendants did not have a right to indemnity and contribution under RCRA); *see also United States v. Domestic Industries, Inc.*, 32 F.Supp.2d 855 (B.D. Va. 1999) (declining to recognize contribution or indemnity claim for civil penalties under RCRA). The simple reason that there is no right of contribution or indemnity under RCRA is because RCRA is not a statute aimed at compensation. As explained by the Supreme Court:

> . . . RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. RCRA's primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment." ... RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts. Under a plain reading of this remedial scheme, a private citizen suing under § 6972(a)(1)(B) could seek a mandatory injunction, i.e., one that orders a responsible party to "take action" by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that "restrains" a responsible party from further violating RCRA.

Meghrig v. KFe Western, Inc., 516 U.S. 479,484-85 (1996) (internal citation omitted). In sum, Third-Party Plaintiffs' claims against Dotson under the State's RCRA claim are not viable.

E. There Is No Right of Indemnity in Favor of a Third-Party Plaintiff Found Liable to the State Under Its CERCLA Claims, and, Further, Whether a Third-Party Plaintiff Found Liable to the State Under Its CERCLA Claims Is Entitled to Contribution Is Questionable.

The State has asserted, pursuant to CERCLA, a cost recovery claim and a natural resource damages claim against the Third-Party Plaintiffs. *See* F AC, ¶¶ 70-77 & 78-89 (docket #18). With respect to the CERCLA cost recovery claim, the State seeks to recover from the Third-Party Plaintiffs, jointly and severally, *inter alia*, all of its past and present necessary response costs, as well as being entitled to a declaratory judgment holding the Third-Party Plaintiffs, again jointly and severally, for all future further necessary response costs. *See* FAC, § 77 (docket #18). With respect to the CERCLA natural resource damages claim, the State seeks to recover from the Third-Party Plaintiffs, jointly and severally, *inter alia*, damages for injury to, destruction of, and loss of these natural resources, including but not limited to (a) the cost to restore, replace, or acquire the equivalent of such natural resources, (b) the compensable value of lost services resulting from the injury to such natural resources, and (c) the reasonable cost of assessing injury to the natural resources and the resulting damages. *See* F AC, ¶ 89 (docket #18). The Third-Party Complaint against Dotson, in turn, attempt to assert CERCLA contribution and indemnity claims pursuant to 42 V.S.C. § 9613(f). S*ee* Third-Party Complaint, ¶¶ 209-11, 215-16, ¶¶ 45-46, 51-52.

Taking the issue of the indemnity claims first, it is clear that the Third-Party Plaintiffs' claims for indemnity against Dotson are not viable under the State's CERCLA claims. *See, e.g., United States v. Cannons Engineering Corp.*, 899 F.2d 79,92 (1st Cir. 1990) ("we refuse to read into the [CERCLA] statute a right to indemnification "); *Central Illinois Public Service Co. v. Industrial Oil Tank & Line Cleaning Service*, 730 F.Supp. 1498, 1507 (W.D. Mo. 1990) ("[I]nferring equitable indemnity would be inconsistent with the letter and intent of CERCLA. . . . CERCLA does not establish a right to indemnity"). As explained by the Cannons Engineering court, "Appellants allege no contractual basis for indemnification. Their noncontractual indemnity claim, by definition and

extrapolation, 'is in effect only a more extreme form of [a claim for] contribution.'" *Cannons Engineering*, 899 F.2d at 92 (citations omitted). The identical reasoning applies here. Therefore, Third-Party Plaintiffs' claims for indemnity against Dotson should be stricken without further consideration.

That leaves Third-Party Plaintiffs' CERCLA contribution claims against Dotson to be addressed. Before proceeding, however, it must be recognized at the outset that there exists a clear distinction between a CERCLA cost recovery or natural resource damages claim under 42 U.S.C. § 9607(a) and a CERCLA contribution claim under 42 U.S.C. § 9613(f). 42 U.S.C. § 9607(a) establishes a federal cause of action in strict liability. *See United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 1535 (l0th Cir. 1995) ("[I]t is now well settled that § 107 [42 U.S.C. § 9607(a)] imposes strict liability on PRPs for costs associated with hazardous waste cleanup and site remediation. . .. It is also well settled that § 107 imposes joint and several liability on PRPs regardless of fault") (citations omitted). In contrast, contribution claims under CERCLA are fault-based. *See Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1240 (7th Cir. 1997) ("§ 113(f) [42 U.S.C. § 9613(f)] exists for the express purpose of allocating fault among PRPs"). Notably, because of these differences, trial of cost recovery claims together with contribution claims results in "a significant multiplication of the issues in the case" and "unduly complicates the trial of the primary claims." *See Kramer*, 770 F.Supp. at 959.

Against this backdrop, namely that, unlike CERCLA cost recovery and NRD claims, CERCLA contribution claims are fault-based, it is open to question whether, under the facts, Third-Party Plaintiffs found liable to the State under its CERCLA claims would even be entitled to contribution from the Third-Party Defendants such as Dotson. Specifically, there is authority

indicating that intentional actors under CERCLA do not have a right of contribution. See *United States v. Ward*, 618 F.Supp. 884,911 (E.D.N.C. 1985) (defendant "may not seek contribution from the third-party defendants for the cleanup costs of the spills in those counties as he is an intentional tortfeasor") (citing, inter alia, Restatement (Second) of Torts, § 886A(3)).[2] Thus, there are valid grounds to question the viability of Third-Party Plaintiffs' CERCLA contribution claims against Dotson. Given the uncertainties of the contribution claims and the fact that such claims raise issues that materially differ from the State's 42 U.S.C. § 9607(a) strict liability claim, prudence dictates that the Third-Party Plaintiffs' CERCLA contribution claim against Dotson be dismissed without further consideration.

F. Even Assuming the Third-Party Plaintiffs' Claims Against Dotson Were Legally Cognizable, This Court Should Exercise its Discretion and Sever and Stay these Claims Pending the Outcome of the State's Case

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[2] While the *Ward* decision predates the 1986 amendment of CERCLA codifying the previously implied right of contribution, there is nothing in either the language of 42 U.S.C. § 9613(f) -- the CERCLA contribution provision -- nor the legislative history to indicate that Congress intended to abrogate the long-standing rule that intentional tortfeasors are not entitled to contribution. Indeed, the legislative history indicates just the opposite. *See* H.R. Rep. No. 99253, Part I, at 80 (Committee on Energy and Commerce) (1985), reprinted in 1986 U.S.C.C.A.N. 2835,2862 ("As with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law"). That Congress did not intend to change the common law should come as no surprise, however. "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104, 108 (1991). "Statues which invade the common law. . . are to be read with a presumption favoring retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citations and quotations omitted). Plainly, "§ 113(f) uses the term contribution in its traditional, common law sense." *In the Matter of Reading Company*, 115 F.3d 1111, 1124 (3rd Cir. 1997).

Against this backdrop, courts in this Circuit have looked to the Restatement (Second) of Torts in determining the federal common law as it pertains to contribution. *See, e.g., United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (citing Restatement (Second) of Torts, § 886A and stating that "any claim that would reapportion costs between these parties is the quintessential claim for contribution"); *Sand Springs Home v. Interplastic Corp.*, 670 F.Supp. 913, 917 (N.D. Okla. 1987) (noting that "the parties do not disagree that § 886A governs the mechanics of contribution under CERCLA"); *accord United States v. R W. Meyer, Inc.*, 932 F.2d 568, 577 (6th Cir. 1991) ("The proper standard for contribution is that contained in section 886A of the Restatement") (concurring opinion). Section 886A(3) of the Restatement is explicit: "There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm." Restatement (Second) of Torts, § 886A(3).

In order to avoid the complication of the proceedings undue prejudice to Dotson's defense that the inclusion of an additional of more than 300 other Third-Party Defendants will create, this Court, assuming *arguendo*, that Third-Party Plaintiffs' claims of contribution and indemnity are even legally cognizable as against Dotson, should exercise its discretion to sever and stay those claims. *See* Fed. R. Civ. P. 14(a) ("Any party may move to strike the third-party claim, or for its severance or separate trial"); Fed. R. Civ. P. 21 ("Any claim against a party may be severed and proceeded with separately"); Fed. R. Civ. P. 42(b) ('The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . " third-party claim. . .").

When faced with a decision whether to sever and/or stay a Third-Party Complaint, courts must use caution and guard against "the numerous pitfalls that proceeding with a third-party action under Fed. R. Civ. P. 14 can create. "When considering a request to sever the impleader claim and for its separate trial, the court typically is concerned with the effect the additional parties and claims will have on the adjudication of the main action -- in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Arthur Andersen LLP v. Standard & Poor's Credit*, 260 F.Supp.2d 1123, 1125 (N.D. Okla. 2003) (quotations and citation omitted); *see also In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. at 438 (related ruling setting forth factors to be considered in whether to sever third-party claims and concluding that 'severance was appropriate). As explained by the Tenth Circuit, "[i]f impleading a third party defendant would require the trial of issues not involved in the controversy between the original parties without serving any convenience, there is no good reason to permit the third-party complaint to be filed." *United States Fidelity & Guaranty Co. v. Perkins*, 388 F.2d 771, 773 (10th

Cir. 1968) (quotations and citation omitted) (noting that the proposed third-party claims would have. caused the "case to mushroom in all directions.")

Severance has been used by the courts in complex environmental cases in the past. For example, in *United States v. Kramer*, 770 F.Supp. 954 (D.N.J. 1991), the court was asked to sever third-party contribution claims filed by defendants in a CERCLA cost recovery action.[3] Refusing to allow the Defendants to join almost 300 Third-Party Defendants, the Court expressed a desire to prevent the trial of primary claims from becoming "bogged down by the contribution claims." Kramer, 770 F.Supp. at 959. The court explained:

> Trial of the third-party claims would involve both a significant multiplication of the number of parties (through the addition of nearly 300 third-party defendants) and a significant multiplication of the issues in the case (through the addition of, for example, the numerous equitable defenses not otherwise relevant to the primary [42 U.S.C. § 9607(a)] action). This would unduly complicate, the issues in the trial of the primary claims, and would delay plaintiffs' prompt recovery of their response costs -- thereby frustrating section 1 07(a)'s purposes.

Kramer, 770 F.Supp. at 959. While acknowledging the arguments posed by the Defendants that, if the third-party action were severed, some of the testimony and evidence might be repetitive, the *Kramer* court noted that those "concerns [were] outweighed by the prospect of overburdening the primary litigation." *Kramer*, 770 F. Supp. at 959. Central to the court's reasoning was the sheer number of third-party defendants: "[T]his is not an ordinary case - it involves more than 50 primary defendants and almost 300 third-party defendants, In addition, the underlying statute in this case

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[3] There is no presumption that CERCLA contribution claims be tried in the primary action. While 42 U.S.C. § 9613(f) provides for a contribution cause of action, CERCLA leaves the decision whether to sever claims against third parties for contribution to the discretion of the trial judge. In fact, "[o]n its face, the [CERCLA] statute expresses no preference either way with regard to whether the contribution claims should be severed; rather, it provides only that those claims may be brought 'during or following' the primary action." *Kramer*, 770 F.Supp. at 957 (emphasis added).

reflects Congress' intention that plaintiffs be able to recover their response costs expeditiously." *Kramer*, 770 F.Supp. At 960 (emphasis in original).

Similarly, in *City of Wichita v. Aero Holdings, Inc.*, 2000 WL 1480490 (D. Kan. Apr. 7, 2000), the City of Wichita filed a CERCLA cost recovery action against 26 Defendants. The defendants, in turn, moved for leave to assert contribution claims against 738 Third-Party Defendants. The court weighed the benefit of a single action "against the delay, confusion, and complexity of adding" more than 700 third-party defendants, concluding that "[i]f the motion were granted, the case would 'mushroom' in all directions and greatly delay resolution of the principal case." *Aero Holdings*, 2000 WL 1480490, ""2. In denying the motion, the court added that "[t]he impleading of 700-plus Third-Party Defendants would also create undue confusion and complexity. *Aero Holdings*, 2000 WL 1480490, *2.

In the instant action, impleader of more than 300 diverse Third-Party Defendants based on numerous independent and unrelated facts and the adjudication of a host of legal and factual issues materially different from those presented in the original claim would unduly prolong, complicate, obscure, confuse, and intolerably prejudice Dotson's defense. Impleading the Third-Party Defendants would introduce new sets of issues and require evidence distinct from that necessary for the adjudication of the primary claims. For example, for each of the 300+ Third-Party Defendants, the Third-Party Plaintiffs would be required to prove, among other things, that the all of the Third-Party Defendants generated waste, that the waste constituents of the Third-Party Defendants such as Dotson are the same as those of the Third-Party Plaintiffs, that the waste constituents of Third-Party Defendants such as Dotson were released into the IRW, and that the waste constituents of the Third-Party Defendants such as Dotson contributed to the injury caused by Third-Party Plaintiffs. The increased discovery burden on all the parties would be enormous.

Additionally, to the extent they are even subject to CERCLA, Third-Party Defendants other than Dotson are likely to assert multiple defenses to Third-Party Plaintiffs' claim to contribution under CERCLA. In that the defenses available to a 42 U.S.C. § 6907(a) cost recovery or NRD claim are limited to only those three provided for in 42 U.S.C. § 6907(b), while the defenses to a 42 U.S.C. § 6913(f) action are substantially broader and varied, there is the real risk that trying both claims at the same time "would unduly complicate the issues in the trial of the primary claims, and would delay Plaintiffs' prompt recovery of their response costs - thereby frustrating section 107(a)'s purposes." *See Kramer*, 770 F.Supp. at 959.

Finally, it is within the Court's discretion to stay the proceedings against Dotson. *See Landis*, 299 U.S. 248. Such a stay would be perfectly consistent with the logic of the "Third-Party Plaintiffs' Opposed Motion to Enlarge Time in Which to Serve Third Party Complaint," wherein Tyson reasoned that an extension would effectuate "efficient case management" inasmuch as it, among other things, "postpones [the third-party defendants'] need to retain counsel and the onset of litigation expenses until such time as it is absolutely necessary."[4]

IV. CONCLUSION

WHEREFORE, premises considered, Third-Party Defendant Wanda L. Dotson respectfully requests this Court to enter an Order dismissing without further consideration, or in the alternative, severing and staying the claims asserted in the Third-Party Complaint. Third-Party Defendant Dotson also requests oral argument on this motion.

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[4] Assuming *arguendo* that a claim might even.be made out against them legally or factually, it is worth noting that the cost of litigating against many of the individuals named as third-party defendants in the instant action, including Dotson, would far outweigh, any amount that these parties might eventually be called upon to contribute.

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